No. 07-1239

IN THE
Supreme Court of the United States

DONALD C. WINTER, Secretary of the Navy, *et al.*,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE*, CALIFORNIA ASSEMBLY MEMBER JULIA BROWNLEY AND CALIFORNIA SENATOR CHRISTINE KEHOE

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BRIEF OF *AMICI CURIAE*, CALIFORNIA ASSEMBLY MEMBER JULIA BROWNLEY AND CALIFORNIA SENATOR CHRISTINE KEHOE

INTERESTS OF *AMICI CURIAE*[1]

Amici are California legislators with particular interest in effectively managing and preserving California's natural resources.

[1] No counsel for a party authored the brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. All parties have consented in writing to the filing of this brief, and the consent letters have been filed with the Clerk.

Assembly Member Julia Brownley represents the 41st District in the California Assembly. She has made environmental protection a top priority, sitting on both the Assembly Natural Resources Committee and on the Budget Subcommittee 3 on Environmental Resources.

Senator Christine Kehoe represents the 39th District in the California Senate. Senator Kehoe has also made environmental protection a top priority. She is the chairperson of the Energy, Utilities, and Communications Standing Committee, and she sits on the Natural Resources and Water Standing Committee, the Coastal Protection and Watershed Conservation Select Committee, and the Joint Committee on Fisheries and Aquaculture.

Assembly Member Brownley authored and Senator Kehoe was the Senate floor manager of California Assembly Joint Resolution 68, adopted August 21, 2008, and enrolled on September 8, 2008, by which "the Legislature of the State of California respectfully requests the President and the United States Navy to abide by the laws governing usage and effects upon the coastal regions of California and adopt the guidelines presented by the California Coastal Commission for training operations off the coast of southern California with respect to sonar usage and marine wildlife[.]"

As reflected in Assembly Joint Resolution 68, Assembly Member Brownley, Senator Kehoe, and the California Legislature have an expressed interest in both the resolution of this case, and in preserving California's voice and role in managing California's natural resources.

SUMMARY OF ARGUMENT

The National Environmental Policy Act ("NEPA") evinces a "manifest concern with preventing uninformed action" by federal agencies, "ensur[ing] that the agency will not act on incomplete information only to regret its decision after it is too late to correct." *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 371 (1989). Uninformed federal actions pose a substantial threat to the interests of the States in conserving their natural resources and environment. Congress has designed NEPA as a cooperative federalism statute to enable States to defend those interests, even in areas where state law has no sway, for "the broad dissemination of information mandated by NEPA permits the public and other government agencies to react to the effects of a proposed action at a meaningful time." *Id.* The Navy's position radically undermines NEPA and the protections it affords to States. NEPA is a flexible statute that accommodates federal government exigencies, but, contrary to the Navy's claims, nothing in the Council of Environmental Quality ("CEQ") "emergency-circumstances" regulation permits the end-run around the district court's preliminary injunction that the Navy attempts here. The CEQ regulation does not apply after the agency has concluded final action under NEPA and a federal district court has assumed jurisdiction. Regardless, Congress did not delegate legislative rulemaking power to CEQ so as to authorize the Navy to act in derogation of its statutory obligations.

ARGUMENT

A. California Has a Strong and Established Interest in Protecting Its Natural Resources.

Consistent with "the structure and limitations of federalism," the States have "great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort and quiet of all persons." *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (italics and internal quotation marks omitted). "As long as a State does not needlessly obstruct interstate trade or attempt to 'place itself in a position of economic isolation,' it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources." *Maine v. Taylor*, 477 U.S. 131, 151 (1986) (quoting *Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. 511, 527 (1935)). This Court has recognized that "the State's interest in preserving its waters was well within its police power," *Sporhase v. Nebraska ex rel. Douglas,* 458 U.S. 941, 946 (1982), and that "[u]nquestionably the States have broad trustee and police powers over wild animals within their jurisdictions." *Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976); *see also Hughes v. Oklahoma,* 441 U.S. 322, 337 (1979) ("We consider the States' interests in conservation and protection of wild animals as legitimate local purposes similar to the States' interests in protecting the health and safety of their citizens."). Without doubt, California's police powers include the authority (and obligation) to protect the State's coastal zone and marine mammals.

1. Congress Has Structured Most Federal Environmental Legislation To Recognize And To Promote States' Interests In Environmental And Natural Resource Protection.

Because of the strength of state interests in protecting the environment and natural resources, most federal environmental laws have been designed by Congress in accordance with "cooperative federalism" principles, "in which federal and state authorities work together to achieve national goals." Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1178 (1995); *see, e.g., Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) ("The Clean Water Act anticipates a partnership between the States and the Federal Government animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'") (quoting 33 U.S.C. § 1251(a)); *Hodel v. Virginia Surface Mining and Reclamation Ass'n., Inc.*, 452 U.S. 264, 289 (1981) ("[T]he Surface Mining Act establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs.").[2] Congress' continued recognition of the

[2] *See also California v. United States*, 438 U.S. 645, 650 (1978) ("If the term 'cooperative federalism' had been in vogue in 1902, the Reclamation Act of that year would surely have qualified as a leading example of it."); *Nat'l Parks Conservation Ass'n., Inc. v. Tennessee Valley Auth.*, 480 F.3d 410, 412 (6th Cir. 2007) (". . . the [Clear Air Act] employs a system of cooperative federalism . . ."); *Northwest Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 674 (9th Cir. 2007) ("[T]he [Bonneville Project] Act establishes an innovative system of cooperative federal-

States' role in realizing national environmental policies is a testament to Congress' understanding that although environmental issues, when aggregated, create a need for national policy, environmental issues are most often experienced, in the first instance, at the local level.[3]

Congress has pursued cooperative federalism in the principal federal statute protecting the nation's coastal lands and waters, the Coastal Zone Management Act ("CZMA"). The purpose of the CZMA is "to preserve, protect, develop and whenever possible, to restore or enhance, the resources of the Nation's coastal zone" of the United States. 16 U.S.C. § 1452(1). Congress intended the legislation to "enhance state authority by encouraging and assisting the states to assume planning and regulatory powers over their coastal zones." *California Coastal Comm'n v. Granite Rock Co.,* 480 U.S. 572, 592 (1987) (quoting S. Rep. No. 92-753, at 1 (1972), *reprinted in*, 1972 U.S.C.C.A.N. 4776). To that end, the statute provides that each federal agency activity "within or outside the coastal zone that affects" a state's coastal zone "shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable

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ism under which the states, within limits provided in the Act, can represent their shared interests in the maintenance and development of a power supply in the Pacific Northwest and in related environmental concerns.").

[3] *See also* Robert L. Fischman, Jaelith Hall-Rivera, *A Lesson for Conservation from Pollution Control Law: Cooperative Federalism for Recovery Under The Endangered Species Act*, 27 COLUM. J. ENVTL. L. 45, 139 (2002) ("The Clean Air Act recognizes that, without state and local partners, the federal government is unequipped to respond to place-based environmental problems that arise from the peculiar circumstances of a region's geography and economy.").

policies of approved State management plans." 16 U.S.C. § 1456(c)(1)(A).

The federal government approved California's Coastal Management Program in 1977. *Am. Petroleum Inst. v. Knecht*, 456 F. Supp. 889, 893-94 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979). "Thus, California is authorized by federal law to review specified federal activities for consistency with its Coastal Management Program." *California v. Norton*, 311 F.3d 1162, 1167-68 (9th Cir. 2002).

2. California Has Passed Extensive Legislation To Protect Coastal Resources And To Promote Cooperation With Federal Agencies.

In 1972, the same year Congress adopted the CZMA, the voters of California approved by popular initiative the California Coastal Zone Conservation Act to provide a comprehensive scheme for managing the coastal zone. *CEEED v. California Coastal Zone Conservation Comm'n,* 43 Cal. App. 3d 306 (1974). This initiative was codified by the California legislature in the California Coastal Act of 1976 (the "Coastal Act"). Cal. Pub. Res. Code §§ 30000 – 30900. The Coastal Act declares that "the California coastal zone is a distinct and valuable natural resource of vital and enduring interest to all the people and exists as a delicately balanced ecosystem[;]" and "[t]hat the permanent protection of the state's natural and scenic resources is a paramount concern to present and future residents of the state and nation." Cal. Pub. Res. Code § 30001(a), (b).[4] *Cf. Granite Rock Co.,* 480

[4] "Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain

U.S. at 591 (upholding Coastal Act against claims of preemption by CZMA and federal mining grants).

The California Coastal Commission, the state agency with primary responsibility for protecting California's coastal zone, was created by the Coastal Act to ensure, among other things, "*maximum state involvement in federal activities*" that affect coastal resources:

> To ensure conformity with the provisions of this division, and to provide maximum state involvement in federal activities allowable under federal law or regulations or the United States Constitution which affect California's coastal resources, to protect regional, state, and national interests in assuring the maintenance of the long-term productivity and economic vitality of coastal resources necessary for the well-being of the people of the state, and to avoid long-term costs to the public and a diminished quality of life resulting from the misuse of coastal resources, to coordinate and integrate the activities of the many agencies whose activities impact the coastal zone, and to supplement their activities in matters not properly within the jurisdiction of any existing agency, it is necessary to provide for continued state coastal planning and management through a state coastal commission.

Cal. Pub. Res. Code § 30004(b).

California agencies other than the Coastal Commission also have responsibility for protecting Cali-

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the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes." Cal. Pub. Res. Code § 30230.

fornia's coastal resources. For example, the Marine Life Protection Act ("MLPA") (Cal. Fish & Game Code § 2850 *et seq.*) directs the California Department of Fish and Game ("DFG") to design and manage a network of marine protected areas ("MPAs") in order to protect marine life and habitats, marine ecosystems, and marine natural heritage, as well as improve recreational, educational and study opportunities provided by marine ecosystems.[5] The MLPA declares that "California's extraordinary marine biological diversity is a vital asset to the state and nation. The diversity of species and ecosystems found in the state's ocean waters is important to public health and well-being, ecological health, and ocean-dependent industry." Cal. Fish & Game Code § 2851(b). Mindful of the Navy's training exercises, the MLPA directs DFG to "confer as necessary with the United States Navy regarding issues related to its activities." Cal. Fish & Game Code § 2863. The Navy's mid-frequency SOCAL testing range occurs within many of California's Marine Protection Areas.[6]

3. The Navy's Actions Flout California State Interests.

As required by the CZMA, the Navy consulted with the California Coastal Commission regarding the

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[5] Related legislation includes the Marine Life Management Act of 1998, 1999 Cal. Stat. Chap. 1052; the Marine Managed Areas Improvement Act of 2000, 2000 Cal. Stat. Chap. 385 (codified at Cal. Pub. Res. Code § 36601-36700.); and the California Ocean Protection Act of 2004, 2004 Cal. Stat. Chap. 719.

[6] Sixteen Marine Protection Areas within Los Angeles, Orange and San Diego Counties are affected by the Navy's SOCAL training program. *See,* "Existing Marine Protected Area Maps and Coordinates," *available at* http://www.dfg.ca.gov/mlpa/maps.asp; J.A. 111-112, 113.

consistency of the mid-frequency active sonar exercises with California's federally approved coastal management plan. The California Coastal Commission understandably conditioned its consistency finding on the Navy implementing reasonable operating standards, considering that the Navy had concluded in the Environmental Assessment ("EA") required by NEPA that the training exercises would result in approximately 170,000 "takes" of protected species. J.A. 223-224. One week after the district court entered a preliminary injunction under NEPA and the CZMA, the Navy sought and obtained a presidential exemption from the CZMA, App. 231a-232a, and an emergency authorization from the CEQ to make alternative arrangements for NEPA compliance, App. 233a-249a. In so doing, the Navy rode roughshod over California's long-recognized interests in its coastal zone and natural resources and sound principles of cooperative federalism.

The California legislature has condemned the Navy's refusal to abide by the California Coastal Commission's reasonable conditions. It adopted a joint resolution authored by Assembly Member Brownley that requests the President and the Navy "to abide by the laws governing usage and effects upon the coastal regions of California and adopt the guidelines presented by the California Coastal Commission for training operations of the coast of Southern California with respect to sonar usage and marine wildlife[.]" *Assembly Joint Resolution No. 68 – Relative to Marine Mammals*, A.J. Res. 68, 2007-08 Reg. Sess. (Cal. 2008).[7]

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[7] In support of this resolution, the legislature declared that "[s]cientific studies have proven a link between the use of mid-frequency sonar and mass deaths, panic, and hearing loss

The Navy at least had a basis in federal law for its CZMA exemption (subject to constitutional concerns expressed by the district court, App. 97a). 16 U.S.C. § 1456(c)(1)(B). But there is simply no basis in any implementing CEQ regulation (much less the statute) to exempt the Navy from its obligations under NEPA, which is likewise designed to safeguard state interests.

B. CEQ Regulations Cannot Be Invoked To Undermine NEPA.

1. NEPA Is a Procedural Statute With Teeth.

The congressional goal in NEPA is plain: "[I]t is the continuing policy of the Federal Government, *in cooperation with State and local governments*, and other concerned public and private organizations, to use all practical means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans." 42 U.S.C. § 4331(a) (emphasis added).

NEPA's "sweeping policy goals" are "realized through a set of 'action-forcing' procedures that require that agencies take a 'hard look' at environmental consequences[.]" *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)). "Although these procedures are almost certain to af-

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among marine wildlife, marine mammals in particular" and that "[t]he standards proposed by the [Coastal] Commission have been deemed operable and acceptable for past training missions of the Navy and the North Atlantic Treaty Organization[.]" *Id.*

fect the agency's substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process." *Id.* NEPA, in other words, imposes "essentially procedural" obligations, although procedural obligations with teeth. *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 558 (1977).

"When a federal entity such as the Navy undertakes an action that will significantly affect the environment, NEPA requires it to prepare an Environmental Impact Statement (EIS) that takes a 'hard look' at the action's impacts." *Nat'l Audubon Soc'y v. Dep't of the Navy*, 422 F.3d 174, 181 (4th Cir. 2005) (per Wilkinson, J.) (citation omitted). If a federal agency fails to prepare a required environmental impact statement, "[c]ourts . . . routinely recognize[ ] the appropriateness of injunctive relief" to enjoin the proposed activity. *Ross v. Fed. Highway Admin.*, 162 F.3d 1046, 1054 (10th Cir. 1998) (collecting cases).

2. NEPA Compels Cooperation With State and Local Governments in Assessing the Environmental Impact of a Proposed Federal Action.

Like the other federal environmental laws discussed above, NEPA codifies a form of cooperative federalism as positive law. *City of Davis v. Coleman, Jr.*, 521 F.2d 661, 672 (9th Cir. 1975). The Act "expressly contemplates that state and local governments are to play an important role in the effectuation of national environmental policy." *Id.*; *Sabine River Auth. v. United States Dep't of Interior*, 951 F.2d 669, 675-76 (5th Cir. 1992) (same). In numerous places, NEPA mandates "cooperation with the State[s]" in implementing NEPA's procedural re-

quirements. 42 U.S.C. § 4331(a).[8] And, "[t]o better integrate environmental impact statements into State and local planning processes," CEQ's own guidelines require that environmental impact statements "discuss any inconsistency of a proposed action with any approved State or local plan and laws[.]" 40 C.F.R. § 1506.2(d). "Where an inconsistency exists," CEQ directs that "the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law." *Id.; see also Maryland-Nat'l Planning Capital Park and Planning Comm'n. v. U.P.S.* , 487 F.2d 1029, 1037 (D.C. Cir. 1973) ("When . . . the Federal Government exercises its sovereignty so as to override local zoning protections, NEPA requires more careful scrutiny.").[9] The

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[8] By way of example, where NEPA requires a federal agency to prepare an environmental impact statement, NEPA also requires that "[c]opies of . . . the comments and views of the appropriate Federal, State, and Local agencies . . . shall be made available to the President, the Council of Environmental Quality and to the public[.]" 42 U.S.C. § 4332(2)(C). Elsewhere, NEPA permits States to prepare a required environmental impact statement on behalf of a federal official so long as the federal official participates in the drafting. 42 U.S.C. § 4332(2)(D).

[9] *See also* 40 C.F.R. § 1502.19(a) ("Agencies shall circulate the entire draft and final environmental impact statements . . . to (a) Any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved and any appropriate Federal, State or local agency authorized to develop and enforce environmental standards."); 40 C.F.R. § 1503.1(a)(2)(i) ("After preparing a draft environmental impact statement and before preparing a final environmental impact statement the agency shall . . . [r]equest the comments of . . . [a]ppropriate State and local agencies which are authorized to develop and enforce environmental standards[.]"); 40 C.F.R. § 1506.2(b) ("Agencies shall cooperate with State and local

President, himself, has directed "the Departments of the Interior, Agriculture, Commerce, *and Defense* and the Environmental Protection Agency [to] implement laws relating to the environment and natural resources in a manner that promotes cooperative conservation, with an emphasis on appropriate inclusion of local participation in Federal decisionmaking[.]" Exec. Order No. 13352, 69 F.R. 52989 (Aug. 26, 2004) (emphasis added) *reprinted in* 42 U.S.C. § 4332. "It is obvious from a reading of [NEPA,]" then, "that the federal agency developing an [environmental impact statement] is expected to cooperate and consult with local government." *Isle of Hope Historical Ass'n, Inc. v. United States Army Corps of Eng'rs*, 646 F.2d 215, 220 (5th Cir. 1981).

The conduct of the Navy in refusing to prepare an environmental impact statement and in bypassing NEPA's procedural requirements to obtain an "emergency circumstances" exemption under 40 C.F.R. § 1506.11 threatens not just the integrity of the processes NEPA requires but the cooperative federalism NEPA supports. California's environmental agencies such as the California Coastal Commission and the Department of Fish and Game were given no opportunity to comment on the Navy's *ex parte* submission to CEQ (nor were interested legislators like *amici* given notice or the opportunity to comment). The Navy did not provide CEQ with the views of the Commission and the State's cooperative and important dual role in effectuating national environmental policy was effectively abrogated. This deficiency was especially grievous because of the Coastal Commission's expertise in California's coastal waters and its

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agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements[.]")

deep familiarity with the facts of this case and the impact of the Navy's training.

The peremptory actions of the Navy and the CEQ cannot be squared with NEPA. In NEPA, Congress codified its desire to have local input in regulating federal activity having a localized environmental impact. *See, e.g.,* 42 U.S.C. § 4332(2)(C). "The concept of the Act was that responsible officials would think about [the] environment *before* a significant project was launched; . . . that alternatives to such action would be seriously canvassed and assayed; and that any irreversible effects of the proposed action would be identified." *City of Boston v. Volpe*, 464 F.2d 254, 257 (1st Cir. 1972). In upholding NEPA's "think-before-you-act" aim, courts recognize that the failure to prepare an environmental impact statement deprives State and local agencies of their participatory right to comment on the environmental implications of the proposed activity and that such a deprivation is itself grounds to enjoin the federal activity. *See, e.g., City of Davis*, 521 F.2d at 672 (reinstating injunction, in part, because, "failure to file an EIS deprives Davis of its opportunity to participate in the administrative decision making process").

3. Unlike the Marine Mammal Protection Act, NEPA Has No National Defense Exemption.

Within its constitutionally recognized powers, Congress is, of course, free to legislate around federal-state cooperation and give the federal executive branch an unchecked hand in implementing environmental law. *See, e.g.*, *Hodel*, 452 U.S. at 290 ("Congress could constitutionally have enacted a statute prohibiting any state regulation of surface coal mining."). Congress chose to give the executive branch just such authority in the Marine Mammal

Protection Act ("MMPA"). 16 U.S.C. § 1371(f).[10] But, Congress has given the executive branch no such authority in NEPA.

The Navy's argument regarding the MMPA and the implications it may or may not raise regarding Congress' substantive order of priorities is beside the point. NEPA commands that a federal agency must consider, study, and analyze the environmental implications of its actions before it acts. *Robertson*, 490 U.S. at 350; *Volpe*, 464 F.2d at 257. It may be true that the MMPA recognizes the discretion to favor national-security interests over environmental concerns in certain circumstances. That legislative balancing does not, however, suggest that the Navy may bypass its procedural obligations to study and to consult with State and local governments before acting. [11]

NEPA and the MMPA prescribe different kinds of obligations – one procedural, the other substantive. The MMPA's recognition of a discretionary exemption to a substantive rule of law does not, in itself, suggest an implied exception to NEPA's procedural goals and Congress' desire for federal-state cooperation. *See Morton v. Mancari*, 417 U.S. 535, 549 (1974) (applying the "'cardinal rule . . . that repeals by implication are not favored'") (quoting *Posadas v. National City Bank of New York*, 296 U.S. 497, 503 (1936)). To find otherwise would overrule this

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[10] Congress created a similar executive branch opt-out to the Coastal Zone Management Act. *See* 16 U.S.C. § 1456(c)(1)(B).

[11] *See also Robertson*, 490 U.S. at 349 ("Publication of an EIS, both in draft and final form, also serves a larger information role. It gives the public the assurance that the agency has indeed considered environmental concerns in its decision making process, . . . and, perhaps more significantly, provides a springboard for public comment.") (citations omitted).

Court's earlier holding that NEPA requires the preparation of an environmental impact statement for all major federal actions except those where an "unavoidable conflict" in statutory authority exists. *See Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Oklahoma*, 426 U.S. 776, 777 (1976).

No such unavoidable conflict exists here. Instead, the MMPA and NEPA are easily reconcilable. The fulfillment of NEPA's procedural goals through the preparation of an environmental impact statement, informed by State and local concerns, provides the Navy (or any other agency) the information it needs in fulfilling its statutory responsibilities whether or not an MMPA exemption is being considered or has been adopted. *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 143 (1981) (describing NEPA's "aims" as (a) "inject[ing] environmental consideration into the federal agency's decisionmaking process" and (b) "to inform the public that the agency has considered environmental concerns in its decisionmaking"). If, after considering the properly prepared environmental impact statement, an agency determines to proceed with the action, NEPA does not stand in its way. *Robertson*, 490 U.S. at 350. The decision will be an informed one, consistent with the goals of both the MMPA and NEPA, and equally serving the goal of cooperative federalism Congress has made part of its environmental law. *J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-44 (2001) ("[W]hen two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary to regard each as effective.") (citation omitted).

C. The CEQ's Interpretation Of The Emergency-Circumstances Regulation Is Contrary To Its Plain Meaning.

Notwithstanding the critical importance of NEPA procedures in this cooperative federalism scheme, the Navy secured from the CEQ a post-injunction ruling that its military training needs constitute "emergency circumstances" justifying an exemption from NEPA requirements under 40 C.F.R. § 1506.11. As the district court and Ninth Circuit held, the CEQ's construction (which effectively creates a national defense exception to NEPA) would render section 1506.11 irreconcilable with the statute, and thus cannot be adopted. App. 51a-52a, 119a-120a; *see Concerned About Trident v. Rumsfeld*, 555 F.2d 817, 823 (D.C. Cir. 1976), *as amended* (1977) ("The Navy, just like any other federal agency, must carry out its NEPA mandate 'to the fullest extent possible' and this mandate includes weighing the environmental costs of the Trident program even though the project has serious national security implications.").

In contesting the Ninth Circuit's ruling, the Navy asks this Court to focus simply on the "CEQ's interpretation of the term 'emergency circumstances,'" and to give the agency's construction of that phrase "controlling weight unless it is plainly erroneous or inconsistent with the regulation" itself. U.S. Br. 23 (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)). But this Court does not construe "phrases in isolation"; it reads statutes and regulations "as a whole." *United States v. Morton*, 467 U.S. 822, 828 (1984). Even if the phrase "emergency circumstances" in section 1506.11 can broadly encompass any situation where an "immediate response is needed to avert a significant impending harm to the

public interest," U.S. Br. 26, this regulation has no application after a federal agency has concluded final action under NEPA and judicial review of that final agency action has commenced under the Administrative Procedure Act. Thus, the fundamental question is not what the phrase "emergency circumstances" means, but whether the regulation purported to authorize CEQ to intervene after the district court had assumed jurisdiction and issued a preliminary injunction.

The answer to the latter is plainly no. The interpretation of a regulation is a "holistic endeavor," and a court must look to the context and purpose of the regulation as a whole. *See United States Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). Section 1506.11 is part of a comprehensive and reticulated scheme for federal agencies to perform their obligations under NEPA. The regulation calls for "[i]dentifying at an early stage the significant environmental issues deserving of study," *see* 40 C.F.R. § 1501.1(d), "to insure that planning and decisions reflect environmental values, to avoid delays later in the process, *and to head off potential conflicts*[.]" S*ee* 40 C.F.R. § 1501.2 (emphasis added). The regulation calls for the preparation of an environmental impact statement for proposed activities having a major environmental impact, and specifies precise procedures and timelines for interagency and intergovernmental consultation, and for public notice and comment. S*ee* 40 C.F.R. §§ 1500.3, 1501.4, 1502.1, 1502.4, 1502.5. Section 1506.11 is merely a safety-valve provision that in true emergencies permits the federal agency to consult with CEQ about "alternative arrangements" for complying with NEPA "without observing the provisions of *these regulations*." 40 C.F.R. § 1506.11 (emphasis added).

It is not an exemption from NEPA itself. See App. 234a (CEQ acknowledgement that 1506.11 only authorizes alternatives to the "procedures set forth in [CEQ] regulations"). The regulation further limits the permitted "alternative arrangements" to "controlling the impact of the emergency" while "[o]ther actions remain subject to NEPA review." *Id.*

Thus, section 1506.11, like all of the surrounding CEQ regulations, applies while the agency is in the process of complying with NEPA – *i.e.*, before the agency has taken final agency action under NEPA. But here the Navy purported to conclude its agency action pursuant to CEQ regulations when it issued the "final EA" in February 2007 in which "the Navy determined that its exercises from February 2007 through January 2009 would not have a significant impact on the environment and, accordingly, that NEPA did not require an EIS for those exercises." U.S. Br. 10 (citing J.A. 112, 226-227); 40 C.F.R. §§ 1501.4(e), 1508.13. Whether or not it could have sought emergency dispensation from CEQ regulations in 2007 under section 1506.11, it never did.

The Navy does not contest that its issuance of the final EA was final agency action; indeed, it has conceded the point in admitting the district court's jurisdiction under the APA. In issuing a preliminary injunction, the issue was whether plaintiff had made a substantial showing that the final EA violated NEPA and the APA, and that was an issue in the sole province of the Article III courts. To the extent that the Navy faced any military emergency or public interest from any mitigation measures imposed in the proposed injunction, that was an issue that the Navy was entitled to raise in appealing to the district court's equitable discretion to forego or limit the in-

junction (or on appellate review for abuse of that discretion). *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-13 (1982). But the Navy cannot invoke a regulation, section 1506.11, that plainly has no application once final agency action under NEPA has been concluded. Giving the regulation this common-sense (and indisputable) construction avoids the serious constitutional questions that would arise if indeed the CEQ could sit in revision of the district court's judgment, deciding the very same facts that the district court had already adjudicated in issuing the preliminary injunction. *See* NRDC Br. 24-30; *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n.2 (1792).

D. The CEQ's Invocation of the "Emergency Circumstances" Regulation Does Not Bind The District Court

Even if section 1506.11 is somehow deemed to apply after final agency action, it cannot affect the injunction. The Navy contends that the "CEQ's approval of alternative NEPA arrangements" under that regulation "removed the legal basis for [the preliminary] injunction," *i.e.*, the district court's finding that the plaintiffs were substantially likely to prove a violation of NEPA. U.S. Br. 18. The Navy misconceives the legal effect of CEQ's regulations.

As an initial matter, the CEQ lacks the power to define the law that the district court must apply in resolving whether the statute is violated. Congress did not delegate to the CEQ any legislative rulemaking power to implement NEPA's prescriptions. *See* 42 U.S.C. § 4344 (defining CEQ's powers); *cf.* App. 111a n. 9. Rather, CEQ derived its powers to promulgate NEPA regulations from Executive Order No. 11991 issued by the President, *see Robertson*, 490 U.S. at 354; Nat'l Envtl. Policy Act Regulations,

43 Fed. Reg. 55978 (July 30, 1979), who likewise is not delegated rulemaking power under NEPA. Accordingly, CEQ regulations do not have the "force of law" akin to the regulations of administrative agencies that exercise a delegated legislative authority from Congress, and section 1506.11 is not "binding in the courts" on any issue of statutory violation. *See United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). CEQ regulations, because issued in exercise of a power delegated from the President, are of course binding on Executive branch agencies, on the familiar principle that any Executive agency must follow its own rules (including any rule imposed by power of the President). *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) ("it is incumbent upon agencies to follow their own procedures"); *Service v. Dulles*, 354 U.S. 363, 388 (1957). But CEQ regulations are not laws to which a court must bow. Only *Congress* can grant the agency "the authority to promulgate binding legal rules." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-81 (2005).

Thus, the CEQ's invocation of its emergency-circumstances regulation could not undermine the legal basis of the injunction or compel judicial action in derogation of statutory mandates. The district court's injunction was premised on a showing of a likely violation of the statute: namely, Congress's directive that all federal agencies (including the Navy) "to the fullest extent possible" "shall" produce a "detailed" environmental impact statement before undertaking "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. §§ 4332 and 4332(2)(C). To be sure, CEQ regulations are entitled to "substantial deference" in interpreting NEPA, s*ee Marsh*, 490 U.S. at 372, and

(if the CEQ's interpretation of its regulation were permissible), the district court could consider that regulation in determining if the Navy had complied with its statutory NEPA obligations "to the fullest extent possible." 42 U.S.C. § 4332. But the deference that CEQ is due is not *Chevron* deference, but only the traditional deference of *Skidmore v. Swift*, 323 U.S. 134 (1944), appropriate to an agency with expertise but not the authority to issue binding legal rules. *See Mead*, 533 U.S. 227-28. *See* NRDC Br. 30-32.

The CEQ's interpretation of the kind of "emergency circumstances" that would relieve a federal agency of its obligations to file an EIS is not a persuasive construction of NEPA. In fact, it is flatly irreconcilable with the statute, as the district court and the Ninth Circuit properly ruled. *See* App. 50a-54a; 121a-122a. Moreover, there is no basis for deference in any event: (1) the CEQ has no expertise in the matter on which it opined, namely, whether the Navy's military training needs constitute an emergency; (2) the CEQ's consideration was rushed and done to further the Navy's litigation interest in defeating the injunction; and (3) the CEQ only considered a partial *ex parte* record compiled by the Navy, and unlike the district court did not benefit from adversarial presentation of the evidence. *See* NRDC Br. 32. Because section 1506.11 lacks the force of law, and because this regulation (as interpreted by the CEQ) is not a persuasive interpretation entitled to weight in interpreting the statute, the district court properly disregarded that regulation in issuing the injunction. *See* NRDC Br. 30-32.

This Court should follow suit. Where the argument the Navy advances is not supported by NEPA, and

where the argument would eliminate the recognized role of State and local governments in cooperative conservation, there is no reason to defer to CEQ or to the Navy. *Maryland Gen. Hosp., Inc. v. Thompson*, 308 F.3d 340, 343 (4th Cir. 2002) ("[D]eference, of course, does not mean blind obedience[.]") (internal citations omitted).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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